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MAICA Corp Sdn Bhd v Bina Satu Sdn Bhd (Abdul Karim bin Ibrahim, contributory) and interveners

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HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO D8–28–930 OF 2000
KANG HWEE GEE J
15 JULY 2008

C

Arbitration — Arbitrator — Appointment — Arbitrator appointed after company wound up — Application by liquidator to confirm appointment of arbitrator — Whether arbitrator validly appointed — Whether application made after limitation period expired — Companies Act 1965 s 355(1), (2) & (3)

D

The respondent company had entered into a project with Peninsular Land Development Sdn Bhd, the second intervener, for the construction and completion of 124 town houses and a club house. Thereafter the respondent
E had commenced arbitration proceedings against the second intervener and on 28 September 2001 appointed an arbitrator to adjudicate on the respondent's claim against the second intervener. Although the parties had commenced arbitration proceedings in good faith it then transpired that the respondent had been wound up on 10 August 2001 without its knowledge. Since the
F appointment of the arbitrator was made after the company was wound up, the respondent applied to the official liquidator for his sanction to proceed with the arbitration. The official liquidator did not give his sanction but advised the respondent to apply to court for leave to proceed with the arbitration. This application was struck out without a hearing for reasons that
G were not disclosed. Thereafter, on the application of the contributory the official liquidator appointed the present liquidator ('the liquidator'). At the creditors' meeting that was called by the liquidator it was resolved that the respondent proceed with the arbitration against the second intervener and that a solicitor be appointed to represent the respondent in the arbitration
H proceedings as the amount to be recovered from the second intervener was estimated at over RM8m. This was an application by the respondent and the liquidator to confirm the appointment of the said arbitrator in the arbitration proceedings between the respondent and the second intervener. The first and second interveners objected to this application and submitted that the
I arbitration proceedings were void for lack of authority as they were commenced without the authority of the liquidator and that the present liquidator's application to authorise the arbitration proceedings was contrary to s 153 of the Contracts Act 1950. The interveners further submitted that the liquidator could have validated the appointment of the arbitrator and the

arbitration at any time before 17 January 2006 but as he did not do so the period of limitation had ended and to allow the validation at this point of time would have the effect of depriving the second intervener of the defence of limitation.

Held, granting an order in terms of the application with the costs to be paid by the interveners:

(1) Technically, the appointment of the arbitrator and the commencement of the arbitration proceedings were initiated when a winding up order had already been made and were therefore irregular as they contravened s 226(3) of the Companies Act 1965 ('the Act'). However, the appointment of the arbitrator and the commencement of the arbitration were mere irregularities which could be validated under s 355(1) read with s 355(3) of the Act (see paras 7–8).

(2) The present case was a proper case for the court to exercise its power under s 355(2) of the Act and to declare that the appointment of the arbitrator and the commencement of the arbitration proceedings as valid. Section 355 of the Act is primarily concerned with whether it is just and fair to validate an ongoing arbitration that was commenced in good faith by the parties themselves and is not in any way subject to the law of limitation. In addition it would appear that the delay in seeking the validation sooner was itself due partly to the approach of the second intervener who was a potential debtor of the company who would stand to gain by any delay or invalidation of the arbitration process. In fact the only reason why the second intervener intervened in this action was to forestall the ongoing arbitration proceedings in the hope of avoiding the respondent's claim (see para 9).

(3) The liquidator had a duty to recover as much of the company's recoverable assets for the benefit of its creditors, and the second intervener was a substantial potential contributor. In fact the liquidator had already called a creditors' meeting and obtained from the creditors the resolutions to act. As such, it was not necessary for the liquidator to give any detailed reasons for wanting to have the appointment of the arbitrator validated and the arbitration continued (see paras 10–11).

(4) The liquidator had justified in his affidavit in support why the solicitor should be appointed and why the arbitration proceedings should be continued by the appointed arbitrator. Thus there was every justification for granting an order in terms (see para 13).

[Bahasa Malaysia summary

Syarikat responden telah memasuki satu projek dengan Peninsular Land

A Development Sdn Bhd, pencelah kedua, untuk pembinaan dan penyiapan 124 rumah bandar dan satu rumah kelab. Seterusnya responden telah memulakan prosiding-prosiding timbangtara terhadap pencelah kedua dan pada 28 September 2001 melantik penimbangtara untuk menghakimi tuntutan responden terhadap pencelah kedua. Walaupun pihak-pihak
B tersebut telah memulakan prosiding-prosiding timbangtara dengan niat yang baik ia kemudiannya diketahui bahawa responden telah digulung pada 10 Ogos 2001 tanpa pengetahuannya. Memandangkan pelantikan penimbangtara tersebut dibuat selepas syarikat itu digulung, responden memohon kepada pegawai pelikuidasi untuk sanksinya meneruskan dengan
C timbangtara tersebut. Pegawai pelikuidasi tidak memberi sanksinya tetapi menasihati responden untuk memohon kepada mahkamah untuk kebenaran meneruskan dengan timbangtara. Permohonan ini telah dibatalkan tanpa satu perbicaraan dengan alasan yang tidak dikemukakan. Seterusnya, pegawai
D pelikuidasi melantik pelikuidasi ini ('pelikuidasi') berkenaan permohonan pencarum. Semasa mesyuarat pemiutang yang dipanggil oleh pelikuidasi ia telah dipersetujui bahawa responden meneruskan dengan timbangtara terhadap pencelah kedua dan seorang peguamcara dilantik untuk mewakili responden di dalam prosiding-prosiding timbangtara memandangkan jumlah
E yang akan diperolehi daripada pencelah kedua adalah dianggarkan melebihi RM8j. Ini adalah permohonan oleh responden dan pelikuidasi tersebut untuk mengesahkan pelantikan penimbangtara tersebut di dalam prosiding-prosiding timbangtara di antara responden dan pencelah kedua. Pencelah pertama dan kedua membangkang permohonan ini dan menghujah
F bahawa prosiding-prosiding timbangtara tersebut adalah tidak sah kerana kekurangan autoriti kerana ia dimulakan tanpa autoriti pelikuidasi dan bahawa permohonan pelikuidasi ini untuk memberi kuasa ke atas prosiding-prosiding timbangtara adalah bercanggah dengan s 153 Akta Kontrak 1950. Pencelah-pencelah tersebut seterusnya berhujah bahawa
G pelikuidasi tersebut boleh mengesahkan pelantikan penimbangtara dan timbangtara tersebut pada bila-bila masa sebelum 17 Januari 2006 tetapi memandangkan dia tidak berbuat demikian maka tempoh had masa telah tamat dan untuk membenarkan pengesahan pada masa ini akan menafikan pencelah kedua terhadap pembelaan had masa.

H

Diputuskan, membenarkan satu perintah berkenaan permohonan dengan kos dibayar oleh pencelah-pencelah:

I (1) Secara teknikal, pelantikan penimbangtara dan permulaan prosiding-prosiding timbangtara dimulakan apabila satu perintah penggulungan telahpun dibuat dan oleh itu adalah di luar aturan kerana ia bercanggah dengan s 226(3) Akta Syarikat 1965 ('Akta tersebut'). Walau bagaimanapun, pelantikan penimbangtara dan permulaan

timbangtara hanyalah salah aturan yang boleh disahkan di bawah s 355(1) dibaca bersama s 355(3) Akta tersebut (lihat perenggan 7–8).

(2) Kes ini adalah satu kes yang wajar untuk mahkamah melaksanakan kuasanya di bawah s 355(2) Akta tersebut dan untuk mengumumkan bahawa pelantikan penimbangtara dan permulaan prosiding-prosiding timbangtara sebagai sah. Seksyen 355 Akta tersebut adalah khususnya berkenaan sama ada ia adalah adil dan saksama untuk mengesahkan satu timbangtara yang sedang berjalan yang telah dimulakan dengan niat baik oleh pihak-pihak terbabit masing-masing dan tidak dalam apa cara tertakluk kepada undang-undang had masa. Tambahan ia akan nampak bahawa kelewatan dalam mendapatkan pengesahan tersebut lebih awal adalah kerana sebahagiannya disebabkan oleh pendekatan pencelah kedua yang merupakan penghutang berpotensi syarikat tersebut yang akan beroleh keuntungan daripada sebarang kelewatan atau ketidaksahan proses timbangtara tersebut. Malahan satu-satunya sebab kenapa pencelah kedua mencelah di dalam tindakan ini adalah untuk melengahkan prosiding-prosiding timbangtara yang sedang berjalan dengan harapan dapat mengelak daripada tuntutan responden (lihat perenggan 9).

(3) Pelikuidasi tersebut mempunyai tanggungjawab untuk mendapatkan balik sebanyak mungkin aset-aset syarikat yang boleh dituntut balik untuk faedah kreditor-kreditornya, dan pencelah kedua adalah bakal penyumbang yang mencukupi. Malahan pelikuidasi tersebut telahpun memanggil satu mesyuarat kreditor-kreditor dan memperolehi daripada kreditor-kreditor resolusi-resolusi untuk bertindak. Oleh itu, ia tidak perlu bagi pelikuidasi untuk memberi alasan-alasan terperinci untuk ingin mendapatkan pelantikan penimbangtara disahkan dan timbangtara tersebut diteruskan (lihat perenggan 10–11).

(4) Pelikuidasi telah memberikan justifikasi di dalam afidavit sokongannya kenapa peguamcara patut dilantik dan kenapa prosiding-prosiding timbangtara patut diteruskan oleh penimbangtara yang dilantik. Oleh itu terdapat justifikasi untuk membenarkan perintah seperti dipohon (lihat perenggan 13).]

Notes

For cases on appointment, see 1 *Malllal's Digest* (4th Ed, 2005 Reissue) paras 1244–1252.

Cases referred to

Brickwood Consolidated Sdn Bhd v Kenneth Teh Ah Kiam & Anor [2000] 4 AMR 4853, HC (refd)

Kian Joo Holding Sdn Bhd (In Liquidation), Re; Abdul Jabbar bin Abdul Majid & Anor, applicants [1999] 6 MLJ 352, HC (refd)

Legislation referred to

Companies Act 1965 ss 226(3), 236, 237, 241, 355, 355(1), 355(2), 355(3)
Contracts Act 1950 s 153

(Saw & Co) Counsel for the petitioner not present.
Devan Narayanan Raman (Devan & Associates) for the respondent.
WM Chang, Gary Yap (Raja Daryll & Loh) for the first and second interveners.

Kang Hwee Gee J:

[1] This is an application by the respondent and the appointed liquidator for the company under liquidation to confirm the appointment of Mr Sundra Rajoo as the arbitrator in the arbitration proceeding between the respondent and the second intervener Peninsular Land Development Sdn Bhd for a project known as The Proposed Construction and Completion of 124 Units of Medium/High Cost Town Houses and a Club House on Lot 971, Jalan Ritchie, Kuala Lumpur.

[2] The appointment of Mr Sundra Rajoo was made on 28 September 2001 by the respondent and the second intervener after the respondent was wound up on 10 August 2001 without adverting to the official liquidator. The respondent applied to the official liquidator for his sanction to proceed with the arbitration notwithstanding that the appointment of the arbitrator was made without his authority the parties having proceeded with the arbitration not knowing that the company had been wound up earlier.

[3] The official liquidator did not give his sanction but advised the respondent to apply to court for leave to proceed with the arbitration. The application was however struck out without hearing by the late Justice Abdul Wahab Said Ahmad on 31 March 2004 on unknown grounds.

[4] The present liquidator Mr Wong Weng Foo was appointed on 27 March 2006 with the consent of the official liquidator on the application of the contributory Abdul Karim bin Ibrahim.

MR N DEVAN FOR THE RESPONDENT

[5] Pursuant to the order of the court of 2 January 2008 granting the liquidator time of six months to complete his duty the liquidator Mr Wong Weng Foo went about doing his duties and on 25 June 2008 called the creditors' meeting and obtained the majority attending resolved that the respondent proceeds to collect all debts due and owing from the creditors and in addition to that they approved the motion to proceed with the arbitration against Peninsular Land Development to claim the debt due to the

respondent. They also resolved to appoint Messrs Dennis Nik & Wong to represent the company notwithstanding that the court had disallowed their appointment vide a previous application by Mr Wong on 6 March 2008.

[6] The liquidator Mr Wong had stressed in his affidavit in support the necessity of appointing a solicitor to represent the respondent in the arbitration proceeding as the amount to be recovered from Peninsular Land is estimated at over RM8m.

[7] The notes of the creditors' meeting have been enclosed and exhibited as exh 'D' of afidavit Lanjutan Wong Weng Foo affirmed on 30 June 2008.

MR WM CHANG FOR THE FIRST AND SECOND INTERVENERS

[8] The arbitration proceeding is void for lack of authority as it was commenced without the authority of the liquidator and the limitation period has expired.

[9] The limitation period starts on 17 January 2000. The respondent filed its claim with the appointed arbitrator on 21 January 2002. However the claim filed was not valid because it was not authorised by the liquidator. The period of limitation should end on 17 January 2006. The present liquidator is now seeking an order to valid and authorise the arbitration proceeding contrary to s 153 of the Contracts Act 1950 which read as follows:

> 153 Ratification of unauthorized act cannot injure third person
>
> An act done by one person on behalf of another, without that other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have that effect.

[10] The liquidator could have validated the appointment of the arbitrator and the arbitration at any time before limitation sets in on 17 January 2006 under ss 236 and 237 of the Companies Act 1965 but he did not do so.

[11] To allow validation at this point of time would have the effect of depriving the second intervener of the defence of limitation.

[12] The present liquidator cannot validate unauthorised acts which happened before he was appointed. See *Brickwood Consolidated Sdn Bhd v*

Kenneth Teh Ah Kiam & Anor [2000] 4 AMR 4853 per Abdul Malik Ishak J at p 4876:

> Plain and simple, the liquidator in the person of Foong Weng Chee was only appointed on 25 April 1998 and that being the case he was not the liquidator at the material time and was therefore unable to ratify an unauthorised act that was done when he was not in existence at the time when the second agreement was executed.

[13] This court had previously dismissed an application by the liquidator to appoint Messrs Dennis Nik & Wong as solicitors on 6 March 2008 and the liquidator in this case is making the same application in prayer 3 of encl 98.

[14] Reliance has been placed on the resolutions passed by the creditors on 25 June 2008 to authorise the liquidator to appoint solicitors and to dispense with the committee of inspection and to take as long as necessary to complete the liquidation. This goes against the order dated 6 March 2008 which already decided that those solicitors should not be appointed and that the committee of inspection should not be dispensed with.

[15] The discretion of whether or not to rectify the appointment lies with the liquidator. See *Re Kian Joo Holding Sdn Bhd (in liquidation); Abdul Jabbar bin Abdul Majid & Anor, applicants* [1999] 6 MLJ 352.

[16] The liquidator has not given sufficient reasons justifying the extension of time. It is an 'unless order' that the liquidator was ordered to complete the liquidation by the previous order of the court and an 'unless order' carries onerous obligation.

[17] On the facts from the date of the order the liquidator has not done anything except hold the creditors' meeting and made this application which could have been done from the moment he was appointed in 2006.

[18] A 'consent order' (court queries) cannot be changed without the consent of all parties.

FINDINGS AND DECISION

[19] The facts disclose that the arbitrator Mr Sundra Rajoo was appointed and the arbitration commenced in good faith between the parties to adjudicate on the respondent's claim against the second intervener after the

respondent had been wound up just a month earlier without their knowledge. Technically therefore the appointment of Mr Sundra Rajoo and the commencement of the arbitration were irregular for having contravened s 226(3) of the Companies Act 1965 which reads:

> 266(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

[20] The appointment of the arbitrator and the commencement of the arbitration were however, mere irregularities which are not insurmountable and can be validated under s 355(1) read with s 355(3) of the Companies Act 1965 which reads:

> (1) No proceeding under this Act shall be invalidated by any defect irregularity or deficiency of notice or time *unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court*.
>
> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect irregularity or deficiency.
>
> (3) Without affecting the generality of subsection (1) and subsection (2) or of any other provision of this Act, *where any omission defect error or irregularity* (including the absence of a quorum at any meeting of the company or of the directors) *has occurred in the management or administration of a company whereby any breach of this Act has occurred*, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, *the Court* —
>
> (a) *may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any* such omission defect error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result or any such omission defect error or irregularity;

(b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;

(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

[21] I am convinced that this is a proper case for the court to exercise its power under s 355(2) to declare that the appointment of Mr Sundra Rajoo as the arbitrator and the arbitration proceeding which he had commenced valid and that he should continue the arbitration proceeding until the end.

[22] I am unable to agree with the submission of Mr WM Chang that the validation of the appointment of the arbitrator will deny the second intervener of the benefit of the statute of limitation which according to him has set in. First, there is no rule of law that the exercise of the power of the court of s 355 of the Companies Act 1965 is in any way subject to the law of limitation, the prime consideration being whether it is just and fair to validate an ongoing arbitration commenced in good faith by the parties themselves. Second, it would appear that the delay in seeking the validation sooner was itself due partly to the Machiavellian approach of the second intervener who is a potential debtor of the company who would stand to gain by any delay or invalidation of the arbitration process.

[23] The only reason why the second intervener intervened in this action, it is clear is to forestall the ongoing arbitration proceeding in the hope of avoiding the respondent's claim

[24] The case of *Brickwood Consolidated Sdn Bhd*, would not apply in this case as it is concerned with the power of the liquidator to ratify his

pre-appointment act and not the power of court to validate under s 355 of the Companies Act 1965.

[25] Similarly *Re Kian Joo Holding Sdn Bhd (in liquidation)*, is also not concerned with a validation under s 355 of the Companies Act 1965 being merely concerned with the proper exercise of the power of the liquidator.

[26] The liquidator need not in this instance give any detailed reasons for wanting to have the appointment of the arbitrator validated and the arbitration continued. It goes without saying that the liquidator has a duty to recover as much of the company's recoverable assets for the benefit of its creditors and the second intervener is a substantial potential contributor.

[27] It is true that the liquidator has been slow in carrying out his function and had acted only a few months ago to call the creditors' meeting although he had been given six months to complete his task. Nevertheless he had acted and to deny him any further extension to enable him to complete his work at this stage would cause injustice to the creditors and contributory.

[28] The liquidator appears to have taken the cue from the submission of Mr WM Chang as reflected in the judgment of this court given on 6 March 2008 that he should 'first appoint a committee of inspection under s 241 of the Companies Act 1965 whereby at the meeting of the creditors or at any other meetings a decision should be taken as to whether a committee should be formed to decide whether or not action should be taken to recover any assets of the company. If no such committee had been formed then it would be the duty of the liquidator to seek the opinion of the creditors for the same purpose'. The liquidator had on 25 June 2008 called the creditors' meeting and obtained from them the following resolutions:

(a) Perkara 1 dalam notis 'To confirm the appointment of Mr Wong Weng Foo of No 41, Damai Complex, Jalan Dato Haji Eusoff, 50400 Kuala Lumpur as the Liquidator of the Company, as long as necessary to complete the winding up and to pursue all legal actions for the recovery of any sum due and to defend any legal proceedings taken against the Company'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(b) Perkara 2 dalam notis 'To authorise the Liquidator to appoint Messrs Dennis Nik & Wong to represent the Company in the Arbitration proceedings to recover all sum owed to the Company by Peninsular Land Development Sdn Bhd'. Pihak Chan Trading Company, JAK

Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(c) Perkara 3 dalam notis 'To authorise the Liquidator to appoint Messrs Devan & Associates to defend the Company in all other legal proceedings and to institute actions to recover any sum of monies due and owing to the Company, which is at Mr Wong Weng Foo's absolute discretion to decide whether or not to pursue the legal actions'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(d) Perkara 4 dalam notis 'That the Company proceeds with arbitration proceedings and/or legal proceedings to recover all sums owing to the Company by Peninsular Land Development Sdn Bhd and authorise the Liquidator to take any steps necessary to give effect to this'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(e) Perkara 5 dalam notis 'To institute legal proceedings against any of the debtors of the Company to recover the sums owing to the Company that in the opinion of the Liquidator is possible to recover'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(f) Perkara 5 dalam notis 'That Mr Wong Weng Foo will notify the creditors on the litigations and arbitrations status and amounts recovered thereform, if any'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd dan Associated Structural Concrete Sdn Bhd meluluskan. Tiada yang membantah.

(g) Perkara 6 dalam notis 'To dispense with a Committee of Inspection'. Pihak Chan Trading Company, JAK Construction Sdn Bhd, Yong Hon Sin Plumbing & Construction Sdn Bhd meluluskan. Pihak Associated Structural Concrete Sdn Bhd membantah terhadap perkara ini.

[29] Indeed the only reason why this court did not approve the liquidator's application on 6 March 2008 to appoint the same solicitor Messrs Dennis Nik & Wong was only because the liquidator did not give sufficient reasons to justify why a solicitor should be appointed. Now that the liquidator had justified in his affidavit in support why the solicitor should be appointed and why the arbitration proceeding should be continued by Mr Sundra Rajoo there is every justification for me to grant order in terms of this application.

[30] The interveners shall pay the costs of this proceeding to be taxed forthwith.

Interveners to pay costs.

Reported by K Nesan